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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Reserved on: 02nd September, 2021
Decided on : 14th September, 2021

\+ **W.P.(CRL) 1823/2020, CRL.M.A. 15208/2020, CRL.M.A. 11302/2021, CRL.M.A. 11304/2021**

SHRIRAJ INVESTMENT AND FINANCE LIMITED & ORS. ..... Petitioners

Through : Mr.Kapil Sibal, Senior Advocate with Ms.Ranjana Roy Gawai, Ms.Vasudha Sen, Ms.Prachi Golechha and Mr.Arshdeep S. Khurana, Mr.Ujjwal Jain, Advocates.

versus

UNION OF INDIA THR. SECRETARY & ANR. ..... Respondents

Through : Mr.Chetan Sharma, ASG with Ms.Shiva Lakshmi, CGSC, Mr.Kirtiman Singh, Mr.Waize Ali Noor, Ms.Taha Tasin, Advocates for UOI.

Ms.Sonam Sharma (Sr.Asst. Director), with Ms.Shivani Sharma, Mr.Vishal Srivastava for SFIO.

Mr.Shikher Upadhyay and Ms.Ayushi Singh, Advocates for impleader/Torsion Digital Network.

\+ **W.P.(CRL) 1414/2021 & CRL.M.A. 11968/2021**

CASPER CONSUMER ELECTRONICS PVT LTD..... Petitioner

Through : Mr.Sandeep Sethi, Senior Advocate with Ms.Ranjana Roy Gawai, Ms.Vasudha Sen, Mr.Arshdeep Singh, Ms.Prachi Golechha, Advocates.

versus

UNION OF INDIA & ANR. ..... Respondents

Through : Mr.Chetan Sharma, ASG with Mr.Anurag Ahluwalia, CGSC for UOI with Mr.Syed Hussain Adil Taqvi and Mr.Abhigyan, Advocates.

CORAM:
HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J. *(Through Video Conferencing)*

1. Both these petitions are taken up together as similar issues are being raised.

2. W.P.(CRL.)*1823/2020* is filed for impugning the letter dated 29.06.2019 and the corrigendum issued on 29.11.2019 by the respondent no.1 directing the respondent no.2 to file complaint against the petitioners for the offences under the Companies Act, 2013 mentioned therein and secondly issuing directions to respondent no.2 to initiate the proceedings under Section *241/242/246* read with Section *339* of the Companies Act, before the NCLT.

3. It is submitted the letter dated 29.06.2019 calls for freezing and disgorgement of assets of 157 companies to be sold despite the fact such companies are functional. Following grounds have been taken to challenge the impugned order ***a)*** per Section *212(14)* of the Companies Act if the final report is filed before the Central Government, it needs to be examined by it and after taking legal advice it may initiate the prosecution. Section *212(14)* of the Companies Act runs as under:

> *"**212. Investigation into affairs of Company by Serious Fraud Investigation Office***
> *(1) to (13) xxxxx.*
> *(14) On receipt of the investigation report, the Central Government may, after examination of the report (and after taking such legal advice, as it may think fit), direct the Serious Fraud Investigation Office to initiate prosecution against the*

> *company and its officers or employees, who are or have been in employment of the company or any other person directly or indirectly connected with the affairs of the company.*
> *(15) to (17) xxxxxx"*

It is submitted the officers of the Central Government were to examine and apply their mind on the report. It is alleged the final report dated 27.06.2019 was filed before the Central Government and it was humanly impossible to examine such report, consisting of lakhs of pages within two days and then pass the impugned order;

b) Section *212(14A)* of the Companies Act came into effect w.e.f. 15.08.2019 wherein for the first time power of disgorgement of properties came into effect but whereas in the present case on dated 29.06.2019 the order for disgorgement was issued, hence it is a premature letter without any power Section *212(14A)* is as under:

> *"(14A) Where the report under sub-section (11) or sub-section (12) states that fraud has taken place in a company and due to such fraud any director, key managerial personnel, other officer of the company or any other person or entity, has taken undue advantage or benefit, whether in the form of any asset, property or cash or in any other manner, the Central Government may file an application before the Tribunal for appropriate orders with regard to disgorgement of such asset, property or cash and also for holding such director, key managerial personnel, other officer or any other person liable personally without any limitation of liability."*

c) Section *241*, *242* of Companies Act deals with mismanagement of affairs of the company and it does not provide any power of attachment of property of the company or disgorgement; ***d)*** the issue of jurisdiction cannot be decided by NCLT as it has no power to review the administrative order(s), hence the only remedy is filing of a Writ Petition and ***e)*** Section *241*, *242* of Companies Act since deal with affairs of the company there cannot be an

onerous order of attachment and/or disgorgement of 157 companies. It was rather stated if the SFIO feels there is a problem with 2-3 companies they can deal with those companies separately and seek remedy under Section *241*, *242* of Companies Act and lastly it was argued such power of disgorgement, even otherwise, can be ordered only after trial and not at filing of chargesheet. It is argued unless the State proves its case of disgorgement, no order can be passed by NCLT for such an action.

4. The learned senior counsel for the petitioner, to prove such penal provisions only have a retrospective effect, referred to *Commissioner of Income Tax (Central)-I, New Delhi vs. Vatika Township Private Limited* (2015) 1 SCC (1), a Constitutional Bench judgment, wherein the Court held as under:

> *"31. In such cases, retrospectively is attached to benefit the persons in contradistinction to the provision imposing some burden or liability where the presumption attaches towards prospectivity. In the instant case, the proviso added to Section 113 of the Act is not beneficial to the assessee. On the contrary, it is a provision which is onerous to the assessee. Therefore, in a case like this, we have to proceed with the normal rule of presumption against retrospective operation. Thus, the rule against retrospective operation is a fundamental rule of law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication. Dogmatically framed, the rule is no more than a presumption, and thus could be displaced by out weighing factors.*
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> *34. It would also be pertinent to mention that assessment creates a vested right and an assessee cannot be subjected to reassessment unless a provision to that effect inserted by amendment is either expressly or by necessary implication retrospective. (See Controller of Estate Duty Gujarat-I v. M.A. Merchant[9].*"

5. Further in *Hitendra Vishnu Thakur & Ors. Vs. State of Maharashtra & Ors.* (1994) 4 SCC 602 the Court held as under:

> "*26. The Designated Court has held that the amendment would operate retrospectively and would apply to the pending cases in which investigation was not complete on the date on which the Amendment Act came into force and the challan had not till then been filed in the court. From the law settled by this Court in various cases the illustrative though not exhaustive principles which emerge with regard to the ambit and scope of an Amending Act and its retrospective operation may be culled out as follows:*
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> *(i) A statute which affects substantive rights is presumed to be prospective in operation unless made retrospective, either expressly or by necessary intendment, whereas a statute which merely affects procedure, unless such a construction is textually impossible, is presumed to be retrospective in its application, should not be given an extended meaning and should be strictly confined to its clearly defined limits.*
> *(ii) Law relating to forum and limitation is procedural in nature, whereas law relating to right of action and right of appeal even though remedial is substantive in nature.*
> *(iii) Every litigant has a vested right in substantive law but no such right exists in procedural law.*
> *(iv) A procedural statute should not generally speaking be applied retrospectively where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished.*
> *(v) A statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication.*"

6. Heard.

7. Before proceeding let me first examine the issue of jurisdiction. It is a settled law the challenge to the jurisdiction of NCLT ought to have been raised before NCLT itself. Once the proceedings have been initiated before NCLT and if the NCLT is seized with the company petition, all contentions

including power of the respondent to initiate such proceedings before NCLT must be raised before such forum and be determined in those proceedings. The petitioner herein in fact is seeking quashing of impugned order/letter dated 29.06.2019 which is in effect challenging the jurisdiction of NCLT. Since the petition has already been filed under Section *241*, *242* of the Companies Act; notice having been issued; the contention raised before this Court on the point of jurisdiction of NCLT can very well be raised before the NCLT. Companies Act is a complete code hence statutory mechanism under it cannot be bypassed. Section *430* of the Act provides the jurisdiction of all Civil Courts is barred in respect of the matter which the NCLT or the NCLAT is empowered to determine by or under Act.

8. Section *430* of Companies Act is as under:

> *"430. No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Tribunal or the Appellate Tribunal is empowered to determine by or under this Act or any other law for the time being in force and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or any other law for the time being in force, by the Tribunal or the Appellate Tribunal."*

9. Thus though the provisions of the Act do not take away the jurisdiction of this Court under Article *226* but it is a trite law in case where the statute provides for an exhaustive mechanism to deal with all matters pertaining to statute and manifest an intention to bar the jurisdiction of all other Courts, such Writs should not be entertained unless there are extreme and/or extraordinary circumstances.

10. Thus there is readily available alternate remedy viz. to raise objection to maintainability of company petition before the NCLT itself and if

aggrieved by the decision of the NCLT the petitioner is free to avail appellate remedy before the NCLAT under section *421* and further appeal to the Supreme Court under section *423* of the Act. The grievance pertains to the institution of company petition can very well be addressed by the authorities created under the Act and finally by the Hon'ble Supreme Court.

11. In *Raj Kumar Shivhare v. Directorate of Enforcement* (2010) 4 SCC 772 the Hon'ble Supreme Court had held when the statutory forum is created by law for redressal of grievance and that too in a fiscal statute, a writ petition should not be entertained ignoring the statutory dispensation. statutory remedy should not be abdicated and given a go-by by a litigant for invoking the forum of judicial review of the High Court under writ jurisdiction.

12. In *State Bank of Travancore vs. Mathew K.C.* (2018) 3 SCC 85 the Court held as under:

> *"5. We have considered the submissions on behalf of the parties. Normally this Court in exercise of jurisdiction Under Article 136 of the Constitution is loathe to interfere with an interim order passed in a pending proceeding before the High Court, except in special circumstances, to prevent manifest injustice or abuse of the process of the court. In the present case, the facts are not in dispute. The discretionary jurisdiction Under Article 226 is not absolute but has to be exercised judiciously in the given facts of a case and in accordance with law. The normal Rule is that a writ petition Under Article 226 of the Constitution ought not to be entertained if alternate statutory remedies are available, except in cases falling within the well defined exceptions as observed in Commissioner of Income Tax and Ors. v. Chhabil Dass Agarwal, MANU/SC/0802/2013 : 2014 (1) SCC 603, as follows:*
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> > *15. Thus, while it can be said that this Court has recognised some exceptions to the Rule of alternative remedy i.e. where the statutory authority has not acted*

> *in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed, or when an order has been passed in total violation of the principles of natural justice, the proposition laid down in Thansingh Nathmal case, Titaghur Paper Mills case and other similar judgments that the High Court will not entertain a petition Under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance still holds the field. Therefore, when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation."*

13. Further in *Arcelormittal India (P) Ltd. vs. Satish Kumar Gupta* (2019) 2 SCC 1 the Court held:

> *84. xxxxx The non-obstante Clause in Section 60(5) is designed for a different purpose: to ensure that the NCLT alone has jurisdiction when it comes to applications and proceedings by or against a corporate debtor covered by the Code, making it clear that no other forum has jurisdiction to entertain or dispose of such applications or proceedings.*

14. This Court does not have territorial jurisdiction to entertain this Writ Petition as the company petition is filed before the NCLT at Allahabad and in respect of the companies having its registered office in the State of Uttar Pradesh that is beyond the jurisdiction of this Court. It was submitted by the learned ASG, presently, the action is being taken only against seven companies viz. the petitioners herein whose all registered offices are situated in Uttar Pradesh and the action is not contemplated as of now against 157 companies.

15. I may here add a mere issuance of impugned letter does not provide a cause of action to the petitioner at Delhi as it arises only after filing of the

company petition before the NCLT which had taken place outside the territorial jurisdiction of this Court. The mere fact the respondent no.1 and SFIO/respondent no.2 have their headquarters within the jurisdiction of this Court would not be enough to confer jurisdiction. In *Kusum Ingots & Alloys Ltd. vs. Union of India*, (2004) 6 SCC 254 the Court held:

> *"21. A parliamentary legislation when receives the assent of the President of India and published in an Official Gazette, unless specifically excluded, will apply to the entire territory of India. If passing of a legislation gives rise to a cause of action, a writ petition questioning the constitutionality thereof can be filed in any High Court of the country. It is not so done because a cause of action will arise only when the provisions of the Act or some of them which were implemented shall give rise to civil or evil consequences to the petitioner. A writ court, it is well settled would not determine a constitutional question in vacuum.*
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> *22. The court must have the requisite territorial jurisdiction. An order passed on writ petition questioning the constitutionality of a Parliamentary Act whether interim or final keeping in view the provisions contained in Clause (2) of Article 226 of the Constitution of India, will have effect throughout the territory of India subject of course to the applicability of the Act.*
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> *Situs of office of the Respondents - whether relevant?*
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> *23. A writ petition, however, questioning the constitutionality of a Parliamentary Act shall not be maintainable in the High Court of Delhi only because the seat of the Union of India is in Delhi. (See Abdul Kafi Khan v. Union of India and Ors., MANU/WB/0086/1979 : AIR1979Cal354).*
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> *24. Learned counsel for the appellant in support of his argument would contend that situs of framing law or rule would give jurisdiction to Delhi High Court and in support of the said contention relied upon the decisions of this Court in Nasiruddin v. State Transport Appellate Tribunal MANU/SC/0026/1975 : [1976]1SCR505 and U.P. Rashtriya Chini Mill Adhikari Parishad, Lucknow v. State of U.P. and Ors. MANU/SC/0422/1995 : AIR1995SC2148 . So far as the decision of this Court in Nasiruddin v. State Transport Appellate Tribunal (supra) is concerned it is not an authority for the proposition that*

the situs of legislature of a State or the authority in power to make subordinate legislation or issue a notification would confer power or jurisdiction on the High Court or a bench of the High Court to entertain petition under Article 226 of the Constitution. In fact this Court while construing the provisions of United Provinces High Courts (Amalgamation) Order, 1948 stated the law thus:

"The conclusion as well as the reasoning of the High Court is incorrect. It is unsound because the expression "cause of action" in an application under Article 226 would be as the expression is understood and if the cause of action arose because of the appellate order or the revisional order which came to be passed at Lucknow then Lucknow would have jurisdiction though the original order was passed at a place outside the areas in Oudh. It may be that the original order was in favour of the person applying for a writ. In such case an adverse appellate order might be the cause of action. The expression "cause of action" is well-known. If the cause of action arises wholly or in part at a place within the specified Oudh areas, the Lucknow Bench will have jurisdiction. If the cause of action arisen wholly within the specified Oudh areas, it is indisputable that the Lucknow Bench would have exclusive jurisdiction in such a matter. If the cause of action arises in part within the specified areas in Oudh it would be open to the litigant who is the dominus litis to have his forum conveniens. The litigant has the right to go to a Court ' where part of his cause of action arises. In such cases, it is incorrect to say that the litigant chooses any particular Court. The choice is by reason of the jurisdiction of the Court being attracted by part of cause of action arising within the jurisdiction of the Court. Similarly, if the cause of action can be said to have arisen partly within specified areas in arisen in Oudh and partly outside the specified Oudh areas, the litigant will have the choice to institute proceedings either at Allahabad or Lucknow. The Court will find out in each case whether the jurisdiction of the Court is rightly attracted by the alleged cause of action".

16. This Court does not exercise supervisory jurisdiction under Article 227 over NCLT at Allahabad and such jurisdiction vests solely with High Court of Judicature at Allahabad.

17. The Hon'ble Supreme Court in various judgments have held Section 430 of the Companies Act has to be construed strictly and the NCLT has been given inherent powers to decide the matters of the companies and should not be interfered with lightly. In *SAS Hospitality Pvt. Ltd. vs. Surya Constructions Pvt. Ltd.* 2018 SCC Online Delhi 11909 the Court held:

> *".... 10. Before going into the question as to whether this Court has the jurisdiction to entertain and try the present suit and grant reliefs prayed for, it is necessary to analyze the scheme of the Companies Act, 2013, along with the constitution of the NCLT. The NCLT has been vested with powers that are far reaching in respect of management and administration of companies. The said powers of the NCLT include powers as broad as · '(regulation of conduct of affairs of the company) under Section 242(2)(a), as also various other specific powers. NCLT is a tribunal which has been constituted to have exclusive jurisdiction in the conduct of affairs of a company and its powers can be contrasted with that of the CLB under the unamended Companies Act, 1956*
> *26. The bar under Section 430 of the 2013 Act has, therefore, to be strictly construed and there can be no doubt about that. The Division Bench also considered Dhulabai v. State of· M.P. AIR 1969 SC 78 (hereinafter, 'Dhulabai'), and held as under:*
> *..... 34. Yet another reason for holding that this Court would have no jurisdiction is fact that the matter is also pending before the CLB (now transferred to the NCLT at the instance of one of the directors}. The interim order passed by this Court has been in operation since 12th March, 2014. The said interim order would, continue for a further period of 4 weeks in order to enable the Plaintiff to approach the NCLT ... "*

18. Thus facts discussed above do satisfy this Court has no jurisdiction to entertain this petition.

19. Even otherwise, a bare perusal of Section *241,242,246* r/w *339* would reveal they are not dependent upon even filing of a SFIO report u/s *212 (12)* of the Act. The Central Government, at any stage, on basis of any material

before it, form an opinion to file petition under Section *241*,*242*,*246* r/w *339* of the Companies Act. In the present case, though the Central Government has decided to file the same after receipt of SFIO report, however, the Act puts no fetters upon the Central Government to await a SFIO report, to form its opinion that the affairs of the Company are being conducted in a manner prejudicial to the public interest and of the Company.

20. The power vested in the Central Government under Section *241* of the Act is predicated on the protection of "public interest". This is evident from the reading of the provision itself. Section *241 (2)* provides that:

> *"(2) The Central Government, if it is of the opinion that the affairs of the company are being conducted in a manner prejudicial to public interest, it may itself apply to the Tribunal for an order under this Chapter."*

21. It is verily important and critical to note that Section *242* is a natural corollary and sequitir to the substantive provisions of Section *241*, which mandates the Central Government, in case affairs of a Company have been or are conducted in a manner prejudicial to public interest, the Central Government then may itself apply for an order under this Chapter *XVI* of the Companies Act. The Act has to be read in consonance and uniformity to further the effect of the legislative intent.

22. The reliefs for disgorgement can even be sought under section *241* and *242(1)(l)(m)* de hors Section *212 (14A)* amendment. The Central Government can authorize initiation of proceedings and the relief of freezing assets and disgorgement of property under Section *241*, Section *242* r/w Sec.*246*, and Section *339/447* of the Companies Act inasmuch as disgorgement is a civil action in nature of an equitable relief and not a penal

action. In *Karvy Stock Broking Ltd. v. Securities and Exchange Board of India*, MANU/SB/0064/2008 it has been held that:

> *"…**Disgorgement is a monetary equitable remedy that is designed to prevent a wrongdoer from unjustly enriching himself as a result of his illegal conduct.** It is not a punishment nor is it concerned with the damages sustained by the victims of the unlawful conduct. Disgorgement of illgotten gains may be ordered against one who has violated the securities laws/regulations but it is not every violator who could be asked to disgorge. Only such wrongdoers who have made gains as a result of their illegal act(s) could be asked to do so. **Since the chief purpose of ordering disgorgement is to make sure that the wrongdoers do not profit from their wrongdoing, it would follow that the disgorgement amount should not exceed the total profits realized as the result of the unlawful activity…**"*

23. Thereafter, again in *Shadilal Chopra v. SEBI*, the SAT, Mumbai in Appeal No.*201/2009* decided on 02.2.2009 held that:

> *"Disgorgement is the forced giving up of profits obtained by illegal or unethical acts. **It is a repayment of ill-gotten gains that is imposed on wrongdoers. It is a monetary equitable remedy that is designed to prevent a wrongdoer from unjustly enriching himself as a result of his illegal conduct. It is not a punishment.** In this view of the matter, no fault can be found with the impugned order passed by the whole-time member."*

24. Disgorgement occurring in Section *212 (14A*) cannot be read in blissful isolation whereas, the length and breadth of the Act, chapter and verse bespeaks of such properties/ shares/ debentures, to be frozen/ liquidated/disposal/ sold for utilization in furtherance of public interest by way of sale, recovery of undue gains to alleviate the wrong done to persons/ financial institutions.

25. Further, the impugned letter dated 29.06.2019 and corrigendum dated 18.11.2019 is not to be read as judicial order/ or a statute. It is an executive

order which flows from the statutory scheme as per Section *241, 242, 246* and *339* of the Companies Act.

26. The contention that no charges have been framed as yet does not hold a ground since filing of company petition under Section *241(2)* is not dependent on filing of the chargesheet in the complaint.

27. In the circumstances, there is no merit in the petition(s) and both the petition(s) are accordingly dismissed. Pending application(s), if any, also stands disposed of.

YOGESH KHANNA, J.

SEPTEMBER 14, 2021
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